

From: [Boyd, Andrew](#)
To: [Sheldrake, Beth](#); [Williams, Jonathan](#)
Cc: [Connery, Shannon](#)
Subject: FW: FMC site redevelopment plans FMC FOIA
Date: Tuesday, January 19, 2016 7:15:20 AM
Attachments: [2016-01-18 Third Party Beneficiary Agreement FMC OU RA-G jeg comments.docx](#)

Let's discuss

Andy

From: Jill Grant [mailto:jgrant@jillgrantlaw.com]
Sent: Monday, January 18, 2016 7:03 AM
To: Boyd, Andrew <Boyd.Andrew@epa.gov>
Cc: Sheldrake, Beth <sheldrake.beth@epa.gov>; Williams, Jonathan <Williams.Jonathan@epa.gov>; Kelly Wright (kwright@sbtribes.com) <kwright@sbtribes.com>; (b) (6); Bill Bacon (bbacon@sbtribes.com) <bbacon@sbtribes.com>; Gussie Lord <glord@jillgrantlaw.com>
Subject: RE: FMC site redevelopment plans

Andy,

My comments are indicated in red-line on the attached draft.

I agree that the draft includes the provisions of UAO paragraph 43 but I think there are a few other issues that need to be identified. First, I think the water treatment facility should be specifically mentioned because it may result in additional restrictions/obligations being placed on FMC and Valley Agronomics. I also think that EPA's role as trustee for the Tribes should be referenced, even though I accept the fact that EPA is the only third-party beneficiary of the agreement.

Thanks,

Jill

Jill Grant & Associates, LLC
1319 F Street NW
Suite 300
Washington, DC 20004
Tel: 202-821-1950
Fax: 202-459-9558
jgrant@jillgrantlaw.com
www.jillgrantlaw.com

From: Boyd, Andrew [mailto:Boyd.Andrew@epa.gov]
Sent: Wednesday, January 13, 2016 12:32 PM
To: Jill Grant
Cc: Sheldrake, Beth; Williams, Jonathan
Subject: RE: FMC site redevelopment plans

Jill

We're planning to approve the transfer agreement next week that I sent you last month. As I indicated in my message to you last month (attached below), the agreement does appear to satisfy the UAO requirements, including the requirement to allow access and restrict land use.

Until such time as we can establish and record the proprietary controls required by the UAO, we want to be sure we have an agreement in place from the transferee enforceable by FMC and the U.S. to allow access and to restrict land use, to record proprietary controls and to subordinate its rights to the proprietary controls agreement.

Let me know if you have any questions or concerns.

Andy

Andrew Boyd

U.S. EPA, Region 10

Tel: (206) 553-1222

boyd.andrew@epa.gov

SENSITIVE COMMUNICATION INTENDED ONLY

FOR USE OF RECIPIENTS NAMED ABOVE

From: Boyd, Andrew

Sent: Thursday, December 17, 2015 5:16 PM

To: 'Jill Grant' <jgrant@jillgrantlaw.com>

Cc: Sheldrake, Beth <sheldrake.beth@epa.gov>; Williams, Jonathan <Williams.Jonathan@epa.gov>

Subject: RE: FMC site redevelopment plans

Jill

Attached is the agreement FMC has prepared pursuant to paragraph 43 of the FMC UAO for Remedial Design and Remedial Action that I mentioned when we spoke. Paragraph 43 of the UAO provides that FMC OU property can only be transferred if: (1) proprietary controls required by UAO Par. 46(c) have been recorded; or (2) FMC has obtained an agreement from the transferee enforceable by FMC and the U.S. to allow access and to restrict land use, to record proprietary controls and to subordinate its rights to the proprietary controls.

Because proprietary controls required by UAO par. 46(c) are not expected to be established and recorded in advance of the planned lease of the property to be redeveloped, FMC has prepared the attached agreement and submitted it for EPA approval. It does appear to satisfy the Par. 43 requirements, including the requirement to allow access and restrict land use.

We recognize that the Tribes have concerns with the redevelopment that will need to be considered

and addressed, and we wanted to be sure to provide the Tribes with an opportunity to review the agreement along with the remedial design/remedial action proposals for the redevelopment area. Please don't hesitate to call if you have questions.

Andy

Andrew Boyd
U.S. EPA, Region 10
Tel: (206) 553-1222
boyd.andrew@epa.gov

AGREEMENT

THIS AGREEMENT (“**Agreement**”) is made by and between **FMC CORPORATION**, a Delaware corporation (“**FMC**”), and Valley Agronomics, LLC, a Delaware limited liability company (“**Tenant**”) (together, the “**Parties**”).

RECITALS

A. FMC is the parent company of FMC Idaho LLC, which is the fee simple owner of certain property in Pocatello, Idaho known as the FMC Operable Unit (“**OU**”) of the Eastern Michaud Flats Superfund Site. The FMC OU is largely within the exterior boundary of the Fort Hall Indian Reservation of the Shoshone-Bannock Tribes (the “**Tribes**”).

B. The FMC OU is subject to a Unilateral Administrative Order for Remedial Design and Remedial Action having an effective date of June 20, 2013 that the U.S. Environmental Protection Agency (“**EPA**”) issued to FMC, EPA Docket No. CERCLA-10-2013-0116 (the “**UAO**”). The UAO directs FMC to perform the OU remedial action selected in the September 27, 2012 Interim Record of Decision Amendment (“**IRODA**”) for the FMC OU. The UAO and deliverables that FMC has provided to EPA under the UAO, including the FMC OU Remedial Design Work Plan dated December 2013 (the “**Work Plan**”), require FMC to perform remedial action at the FMC OU that in general consists of placing caps on contaminated soil areas and extracting and treating contaminated groundwater and placing the treated groundwater into infiltration or injection units to return the groundwater to the underlying aquifer. The required remedial action includes work within the areas subject to a prospective lease and easement from FMC to Tenant, encompassing portions of what the IRODA and Work Plan identify as Remediation Areas RA-G and RA-J (the “**Lease Area**”). The required remedial action work at RA-G includes, but is not limited to, grading for control and management of storm water runoff, installing a retention basin to hold storm water runoff, installing an extraction well field, and associated monitoring wells, potentially an injection system, and installing a cap to shield gamma radiation (“gamma cap”) (the “**RA-G Remedial Actions**”). In addition, a water treatment facility will be located [indicate location within RA-G]. The required remedial action work at RA-J includes, but is not limited to, grading for control and management of stormwater runoff and removal of the upper six inches of soil (the “**RA-J Remedial Actions**”).

C. Tenant intends to lease from FMC certain air rights above portions of RA-G and RA-J (the “**Leased Premises**”), obtain an easement for property beneath and adjacent to the Leased Premises, and possibly obtain easements for access to other areas of the FMC OU as

needed to support its development and use of the Leased Premises. Tenant intends to use the Leased Premises to construct and operate a fertilizer, seed, and crop-protection formulation and distribution business, including retail sales. FMC and Tenant expect to enter into an Air Rights Lease Agreement (“Air Lease”) and Easement Agreement (“Easement”) under which Tenant will conduct operations at the Leased Premises. A Memo of Lease and the Easement Agreement will be recorded in the real property records of Power County, Idaho, the county in which the Lease Area is located.

Commented [JEG1]: The Tribes would like an opportunity to review these documents to see what these rights consist of and verify compliance with the UAO

D. The UAO and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq., under which the UAO was issued, provide EPA with authority to enforce the UAO and seek specific performance of its requirements. By executing this Agreement, the Parties make EPA an intended beneficiary of this Agreement with authority to enforce its terms and conditions.

NOW, THEREFORE, WITNESSETH in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, FMC and Tenant hereby agree that the above Recitals are incorporated into this Agreement and agree as follows:

AGREEMENT

1. **Definitions.** Defined terms shall have the meaning set forth in this Agreement. Any defined terms used but not defined in this Agreement shall have the meaning set forth in the UAO.
2. **Acknowledgement of Third-Party Beneficiary Status.** The Parties acknowledge and declare that it is their express intent that the covenants and obligations contained herein are not only for their benefit, but also for the benefit of EPA as an intended third-party beneficiary and as trustee for the Shoshone-Bannock Tribes, within whose reservation the Leased Premises are located. The Parties agree that while EPA is not acquiring an interest in real property, EPA may enforce this Agreement and the obligations contained herein in any manner permitted in law or equity, including through specific performance.
3. **No Other Third-Party Beneficiaries.** The provisions of this Agreement are solely for the benefit of FMC, Tenant, and EPA (including EPA in its role as trustee for the Shoshone-Bannock Tribes). Except for EPA as expressly provided herein, no other person, corporation, association, organization, governmental agency or entity, or any other form of entity or arrangement is a third-party beneficiary of this Agreement and no other entities have any authority to enforce or claim any benefit under this Agreement.
4. **No Unacceptable Risk to Human Health or to the Environment.** As set forth in UAO Paragraph 46.b, Tenant agrees that it shall not use the Leased Premises or any other portion of the FMC OU in any manner that EPA determines will pose an unacceptable risk to human

health or to the environment due to exposure to Waste Material or interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial action work required under the UAO, including but not limited to the water treatment facility that is scheduled to be located within RA-G.

Commented [JEG2]: I forget if it's to be on RA-G or adjacent to it – please revise accordingly

5. **Access and Institutional Controls.** Section XIII of the UAO, entitled “Access and Institutional Controls,” requires FMC to provide access to the FMC OU to EPA and, when accompanied by EPA, representatives of the State of Idaho and the Tribes for the purposes enumerated in that Section. After the Parties execute the Air Lease and Easement, Tenant agrees that consistent with UAO Section XIII it shall provide EPA, including its authorized representatives, and representatives of the State of Idaho and the Tribes when accompanied by EPA, with access to the Leased Premises (and any other areas of the FMC OU for which FMC may grant Tenant an easement, lease or other property right) to conduct any activity regarding the UAO, including but not limited to the following activities:

- (1) Monitoring the FMC OU remedial action Work as that term is defined at UAO Paragraph 6.gg;
- (2) Verifying any data or information submitted to EPA;
- (3) Conducting investigations regarding contamination at or near the FMC OU;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the FMC OU;
- (6) Assessing implementation of quality assurance and quality control practices;
- (7) Implementing the Work pursuant to the conditions set forth in UAO Section XXIII (Enforcement / Work Takeover);
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by FMC or its agents, consistent with UAO Section XIV (Access to Information);
- (9) Assessing FMC's compliance with the Order;
- (10) Determining whether the FMC OU or other real property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the UAO; and
- (11) Implementing, monitoring, maintaining, reporting on, and enforcing any Institutional Controls and the requirements of the ICIAP as that term is defined at UAO Paragraph 6.i.

6. **Institutional Controls and Proprietary Controls.** The UAO requires FMC to record Proprietary Controls on the real property, pursuant to UAO Paragraph 46.c. FMC remains responsible for developing and recording such Proprietary Controls. Tenant acknowledges that its use of the FMC OU, including the Leased Premises, is subordinate to the Institutional Controls and Proprietary Controls currently in effect and that may be required or recorded pursuant to UAO requirements subsequent to the Effective Date of this Agreement.

Commented [G3]: Is there any kind of a timeline on when the Proprietary Controls required by ¶ 46(c) will be developed and recorded on this property?

7. **EPA Approval of this Agreement.** The Parties acknowledge that EPA must review and approve this Agreement in writing prior to execution of the proposed Air Lease and Easement.

Deleted:

8. **No Waiver.** No failure by FMC or EPA to insist upon the performance of any term, covenant or condition of this Agreement or to exercise any right or remedy consequent upon a default hereunder will constitute a waiver of any such default or of such term, covenant or condition. No waiver of any default will affect or alter this Agreement, but each and every term, covenant and condition of this Agreement will continue in full force and effect with respect to any other then-existing or subsequent default hereunder.

Deleted: ¶

9. **Applicable Law.** This Agreement is made pursuant to, and will be construed and enforced in accordance with, the laws in force in the State of Idaho. All provisions of this Agreement will be construed as “conditions” and “covenants” as though language specifically expressing or imposing covenants and conditions were used in each separate provision of this Agreement.

Deleted:

10. **Effective Date.** The Effective Date of this Agreement is the date both Parties have signed this Agreement as indicated below.

IN WITNESS WHEREOF, FMC and Tenant have caused this Agreement to be executed as of the Effective Date.

FMC CORPORATION
a Delaware corporation

By: _____
Name:
Title:
Date:

VALLEY AGRONOMICS, LLC

a Delaware limited liability company

By: _____
Name:
Title:
Date:

